IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL
250 North Canon Drive
Beverly Hills, California 90210
(213) 272-5436
In Propria Persona, Petitioner

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TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE UNITED
STATES SUPREME COURT:

Petitioner respectfully petitions this Honorable Court for a writ of certiorari to review a judgment of the Court of Appeal, of the State of California, Second Appellate Distric Division Four, which judgment became final upo denial of a hearing by the California Supreme Court March 1, 1972.

OPINIONS BELOW

The California Supreme Court did not render an opinion upon denial of petitioner's Petition for Hearing. A copy of said denial is annexed hereto as Appendix A.

A copy of the opinion of the Court of Appeal of the State of California, certified for non-publication, is annexed hereto as Appendix B. Said opinion was entered January 3, 1972. A Petition for Rehearing to said Court was denied January 19, 1972. A copy of said denial is annexed hereto as Exhibit C.

A copy of the Judgment of the California trial court, the Superior Court of the State of California in and for the County of Los Angeles is annexed hereto as Appendix D. Said judgment purported to give full faith and credit to the Default Order and Judgment of the original trial court, i.e., Clark Circuit Court of the State of Kentucky. Said Default Order and Judgment is annexed hereto as Appendix E. None of the foregoing opinions are published in any official or unofficial reports.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257(3) which reads in relevant part:

OPINIONS BELOW

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . ."

Petitioner has been denied due process of law in violation of the 14th Amendment of the United States Constitution. The final action of the state courts was the denial of the Petition for Hearing by the California Supreme Court, March 1, 1972. This petition was filed within 90 days thereafter. 28 U.S.C. Section 2101(C).

QUESTIONS PRESENTED FOR REVIEW:

---

(1) Whether the due process clause is violated where a default judgment is entered granting greater or different relief than specified and sought in the complaint and prayer.

(2) Expressed in another manner, is the due process clause violated:

- where the defendant has not been personally served with process (summons),

- where the prayer specifically states that no personal judgment is sought against those defendants not personally served with process (summons),

- where the defendant relies on the specific demands of the complaint's prayer, and therefore defaults and does not contest on the merits, and

- a judgment in personam is entered against that defendant (assuming the court has personal jurisdiction).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 14, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a fundamental question of due process. Petitioner was a limited partner in two limited partnerships which were engaged in the oil business in Kentucky. At all times mentioned Petitioner was and is a California resident,and Petitioner has never had so called "minimum contacts" with Kentucky on account of the partnership dealings there, or otherwise.

The limited partnerships entered into a contract and security agreement with Respondent's assignor. Both the general partner, and the remaining limited partners, personally guaranteed said contract and security agreement.

Respondent commenced an action in Kentucky, naming as parties defendant the limited partnerships as entities and the general and limited partners individually.

The Kentucky complaint sounded quasi in rem; it is annexed hereto as Appendix F. It prayed for adjudication, under the contract and Security Agreement, that

- "Defendants and each of them are indebted to Plaintiff in the principal sum of . . . ," plus interest (Appendix F, p. 30 at A),

- Plaintiff "is the owner" of the property (Security)(Appendix F, p. 30 at B),

- Defaults existed, and Plaintiff was entitled to remove and sell the property (Security), and apply proceeds against Defendant's indebtedness (Appendix F, pp. 35, 36 at D).

- Defendants and each of them are indebted to Plaintiff for a reasonable "attorney's fee. . . ." (Appendix F, p. 36 at G).

The Kentucky complaint also prayed for:

- "personal judgment in said" (principal and interest) "amounts against each Defendant who is personally served with Summons herein" (emphasis added) (Appendix F, p. 35 at A), and

- "personal judgment in said" (attorney's fee) "amount against all Defendants who are personally served with Summons herein (emphasis added)(Appendix F, p. 36 at G).

It is an undisputed fact that Petitioner was never personally served with Summons. Obviously the plain effect of the Prayer is the seeking of personal judgments only against defendants who were personally served with Summons.

Notwithstanding the foregoing limitations the Kentucky court entered its Default Order and Judgment (Appendix D) awarding a "Personal Judgment . . . against Defendants and each of them, jointly and severally." Thus, the Kentucky Court entered a Default Judgment in personam against Petitioner (who was never

personally served with Summons), although the prayer, in two distinct places, sought personal judgment(s) only against Defendants who were "personally served with Summons."

Before issuing its judgment, the Superior Court in and for the County of Los Angeles determined that the Kentucky court had obtained personal jurisdiction over Petitioner, since an attorney who had been hired by the general partner filed a noticed motion which was determined to be a general appearance binding Petitioner according to Kentucky law.

Even supposing that the Kentucky court had personal jurisdiction over Petitioner, the Default Order and Judgment of the Kentucky court entered for failure to file answer cannot properly or validly grant a personal judgment, on default. As above set forth, the prayer expressly does not seek a personal judgment against any defendant who, like Petitioner, was not served with Summons.

Expressed in another way, the defendant is subject only to such a judgment as the complaint demands of him. Any greater or different relief by Default Judgment is unauthorized. The defendant who decides to default is entitled to rely on the specific demands of the Prayer.

This position was presented to the Court of Appeal, highlighted in the Supplement to Appellant's Brief, i.e., December 17, 1971

letter to the Court of Appeal (Appendix G) and included in the Petition for Hearing to the California Supreme Court.

The Court of Appeal did not in any way consider or deal with this important and fundamental question of due process, in its decision.

The California courts gave full faith and credit to a judgment rendered beyond the Kentucky court's power to exercise its jurisdiction and thereby denied Petitioner due process of law.

ARGUMENT

As set forth in Standard Oil Co. v. State of Missouri, 224 U.S. 270 at 281, 32 S.Ct. 406, 56 L.Ed. 760 (1911).

> "The federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and the opportunity to be heard. That necessarily required that the notice and the hearing should be appropriate to that which has been heard and determined on such notice. For even if a court has original jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment

which is beyond the claim asserted, or which in its essential character is not responsive to the cause of action on which the proceeding was based" (emphasis added).

This above proposition is settled case law. As stated in Sylvan Beach v. Koch, 140 F. 2d 852 at 861 (1944).

> "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. . . .
>
> "Unless all parties in interest are in court and have voluntarily litigated some issues not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of relief demanded. . . ." (Emphasis added.)
>
> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and fair play. They assure to every person his day in court before judgment is pronounced against him. . . ."

This fundamental principal of law is again restated thusly:

> "The judgment may not go beyond a determination of the issues presented in the pleadings nor the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest on the basic principles of our jurisprudence that no man shall be deprived of his life, liberty, or property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the judgment sought." Gentry v. U.S., 101 F. 51 (8th Cir. 1900).

The prayer in the instant case specifically did not seek in personam relief against defendants who were not personally served.

Another case supporting the position advanced by Petitioner is Windsor v. McVeigh, 93 U.S. 274 at 282, 23 L. Ed. 914, 917 (1876) wherein it is stated:

> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the powers conferred by law. If, for instance, the action be upon a money demand, the court has not power to pass judgment of imprisonment in the

penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order a specific performance of a contract. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court, in rendering them would transcend the limits of its authority in the cases."

The same considerations are directly applicable here.

California should not have purported to give full faith and credit to an invalid judgment. The following quotations from Reynolds v. Stockton 140 U.S. 254, 7 S.Ct. 773 (1891) are highly relevant:

The full faith and credit clause does not,

". . . demand that a judgment rendered in a court of one state . . . which has jurisdiction of the person but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is

apparent that the defeated party was in fact heard on the matter determined (Emphasis added) is recognized and enforced in the courts of another state.

"If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly also does not preclude inquiry in the courts of another, as to whether the judgment so rendered in a court of one state was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court so rendering it. Take an extreme case: Given a court of general jurisdiction, over actions of ejectment as well as those of replevin; a complaint in replevin for the possession of certain specific property, personal service on the defendant, appearance of the defendant, appearance and answer denying title. Could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision

quoted gives no greater force to the same record in another state."

". . . [w]ithout amendment of the pleadings, a judgment for the recovery of possession of real estate, rendered in an action whose pleadings discloses only a claim for the possesion of personal property, cannot be sustained, although (Emphasis added) personal service was made upon the defendant."

"The invalidity of the judgment depends upon the fact that it is no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language, must be responsive to all matters controverted."

"Here there was no appearance after the filing of the answer. . . ."

". . . [T]he rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

"A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received

> much judicial consideration. . . . It is impossible to concede that because A and B are parties to a suit that a court can decide any matter, in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

IMPORTANT REASONS FOR THE ALLOWANCE OF THE WRIT

As above indicated, the question presented has not received much judicial consideration. Nevertheless it is obvious that this question is in fact fundamental. The Reynolds case, supra, was decided in 1891 and yet the concepts there enumerated are of vital significance today. The due process clause does require that when a party does not in fact have a meaningful opportunity to be heard, since he relied on the specific conditions limiting and excluding in personam judgment against him contained in the pleadings and prayer, no such judgment may issue against that party. This Honorable Court should seize this opportunity not only to

ameliorate a personal injustice to Petitioner but to once again reiterate and reestablish "the basic principle of our jurisprudence that no man shall be deprived of life, liberty or property . . . " without being given "to the parties to be affected an opportunity to be heard respecting the judgment sought" Gentry v. U.S., 101 F. 51 (8th Cir. 1900).

Respectfully submitted,

JEROME B. ROSENTHAL

In Propria Persona,
Petitioner

APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

Mar. 1 972

HEARING DENIED

In re: 2 Civ. No. 38062

Arkansas Louisiana Finance Corporation

vs.

Rosenthal

Respectfully,

G. E. Bishel
Clerk

APPENDIX B

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ARKANSAS LOUISIANA FINANCE CORPORATION,	) Civ. No. 38062) (Sup. Ct.) No. 961867)
Plaintiff and Respondent,	)
vs.	)
J. B. ROSENTHAL,	)
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Los Angeles County. Emil Gumpert, Judge. Affirmed.

Sigelman & Stein, Paul S. Sigelman and Jerome B. Rosenthal, in propria persona, for Defendant and Appellant.

Donald F. Yokaitis for Plaintiff and Respondent.

This is an appeal by defendant, Jerome Rosenthal, from a judgment for plaintiff in an action to enforce a foreign judgment for the payment of money. (Code Civ. Proc. § 1913.)

In the verified complaint, filed September 25, 1969, it was alleged: on January 20, 1969 the Clark Circuit Court of the State of Kentucky, a court of general jurisdiction, rendered a personal default judgment for $106,275.96 in favor of plaintiff and against defendants, jointly and severally. The defendants included Jerome Rosenthal, a resident of California, both individually and as a limited partner in two limited partnerships which were codefendants. Pursuant to a post-judgment order, certain equipment belonging to the partnerships was sold by plaintiff and the proceeds of the sale were credited against the judgment. Except for this credit, no part of the judgment had been paid, and there remained due thereon $93,965.12. Plaintiff sought a judgment in this amount against Rosenthal.

On October 27, 1969 defendant filed an answer admitting rendition of the Kentucky judgment against him "as set forth in the complaint," and praying that the court determine "the exact amount due from him to the plaintiff." On November 4, 1969 he filed a verification of his answer. On February 9, 1970 defendant moved to amend the answer to allege as an affirmative defense that the personal judgment against him was a deficiency judgment

barred by Code of Civil Procedure §§580b and 580d. 1/

On February 17, 1970 plaintiff filed points and authorities in opposition to defendant's motion to amend the answer. Plaintiff therein pointed out that the proposed affirmative defense constituted a collateral attack on a foreign judgment on grounds not permitted in California, the only valid ground of such an attack being lack of jurisdiction of the subject matter or the person, or excess of jurisdiction.

On February 20, 1970 defendant was permitted to file an "Amended First Amended Answer" setting forth as affirmative defenses that the action was barred by sections 580b and 580d, that the Kentucky court lacked personal jurisdiction of defendant, and that the court exceeded its jurisdiction in rendering a judgment against him for any amount in excess of the value of the security in the

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1/ The theory of this defense apparently was: the Kentucky action was based upon a note secured by a chattel mortgage or trust deed; therefore, the judgment in that action was in effect a deficiency judgment which is unenforceable in California because of the provisions of Code of Civil Procedure §§ 580b and 580d, prohibiting rendition of such a judgment in this state.

transaction which had given rise to the Kentucky lawsuit. 2/

On July 22 and 23, 1970 the action was tried without a jury. The following documents were received in evidence on behalf of plaintiff: (1) an exemplified copy of the Kentucky judgment; (2) an exemplified copy of a motion filed in the Kentucky action on February 28, 1968 by Marshall McCann, a Kentucky attorney, on behalf of all of the defendants. In this motion defendants had sought an order dismissing the complaint, for failure to allege facts upon which relief could be granted, and an order striking from the complaint the prayer for recovery of attorneys' fees.

Pursuant to stipulation, the court also received in evidence on behalf of plaintiff the deposition of attorney McCann taken in Kentucky on July 14, 1970. In his deposition McCann stated: in December 1964 he was employed by the limited partnerships to represent them in connection with the acquisition of oil and gas leases in Kentucky. In February 1968, after plaintiff filed the Kentucky action against the partnerships and Rosenthal, individually, McCann was appointed by the court as a "warning order attorney" for Rosenthal. (Under Kentucky procedure, in an action against a nonresident defendant the

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2/ See fn. 1.

court appoints a "warning order attorney" to notify the defendant of the pendency and nature of the action. The cout then issues a "warning order" in which defendant is "warned" to appear and answer within a specified period after entry of the order, and that unless he does so a default judgment in rem may be rendered in favor of the plaintiff.) In his capacity as warning order attorney, McCann sent Rosenthal a letter, dated February 5, 1968, advising him of the pendency of plaintiff's action. Enclosed were copies of the complaint and the warning order.

Upon receiving the letter and enclosures, Rosenthal telephoned McCann, asking "what it was all about." On that occasion McCann talked to Rosenthal to great length. They discussed McCann's contentions that defendants could strike the prayer for attorneys' fees from the complaint, but that they had no defense to the action. As a result of this conversation, McCann assumed he was employed to represent Rosenthal as an individual. In this regard he testified in his deposition: "I can't say that definitely Mr. Rosenthal employed me as his personal attorney but having represented all of them in their limited partnership I assumed I was representing all of them at that time. . . . Whether I was technically employed as Mr. Rosenthal's personal attorney I don't know that there was any conversation about that. I just assumed that I did." Following the telephone conversation with Rosenthal,

McCann filed the motion. Thereafter, he corresponded with Rosenthal and telphoned him from time to time concerning the progress of the lawsuit. Neither by letter nor telephone conversation did Rosenthal raise any question concerning McCann's representation of him.

Defendant Rosenthal testified in his own behalf as follows: He did not authorize or employ McCann to represent him, individually, in the Kentucky action. Neither McCann nor anyone else told Rosenthal that McCann represented him in his individual capacity. Rosenthal received a copy of the complaint which McCann sent him on February 5, 1968, but did not notice until some time thereafter that he, individually, was named as a defendant. When he telephoned McCann after receiving the complaint McCann told him he would file a motion, but Rosenthal did not recall what kind of motion it was. He did not tell McCann not to file the motion.

Rosenthal received a copy of the Kentucky judgment in January 1969. At that time he learned judgment had been rendered against him, personally. However, he did not contact McCann to protest that fact, or to ascertain how a personal judgment could have been rendered against him, because he believed the judgment was void for lack of personal jurisdiction inasmuch as he had not authorized McCann to file "any document on my individual behalf that might in any way be

construed as a general appearance or any appearance."

Rosenthal was served in September 1969 with copies of the summons and complaint in plaintiff's California action to recover judgment against him on the basis of the Kentucky judgment. His failure to plead the defense of lack of personal jurisdiction in his original answer to this complaint was allegedly due to "inadvertence." Between the filing of that answer (October 1969) and the filing of his amended first amended answer (February 1970) he testified that he telephoned McCann in an attempt to clarify the extent of McCann's authority to represent the defendants in the Kentucky action. In that conversation, McCann said, according to Rosenthal, that he recalled Rosenthal had not given him authority to represent Rosenthal, individually. He purportedly further told Rosenthal that the basis of the personal judgment against him was a general appearance which had resulted from McCann's signing and filing certain motions on behalf of all defendants; he indicated that he had signed these motions as "attorney for defendants" as a matter of habit, and did not mean to assert thereby that he had any authority to represent Rosenthal in his individual capacity.

Following Rosenthal's testimony, the court suggested on July 23, 1970, that McCann be further deposed concerning his authority to represent Rosenthal or that, in the alternative, McCann be brought to California to testify.

The trial thereupon was continued to July 30th. On that date, court and counsel had an informal discussion in chambers from which the court concluded that neither party insisted upon further deposing McCann or having him testify personally. Thereafter, in open court the parties agreed they were willing to forego either the oral deposition of McCann or obtaining his answers by written interrogatories, and to submit the matter.

On September 2, 1970 findings of fact and conclusions of law were signed and filed. The court found: the Clark Circuit Court of Kentucky is a court of general jurisdiction; defendant authorized McCann to act as his attorney, and all acts of McCann as such attorney were "confirmed, ratified, acknowledged and consented to by Defendant without any protest or reservation whatsoever"; on or about February 27, 1968 the Kentucky court acquired personal jurisdiction of defendant when he, through his attorney McCann, filed a written motion which constituted a general appearance; the Kentucky judgment in favor of plaintiff and against defendant was a valid, final in personam judgment; none of the affirmative defenses pleaded in the amended answer was valid; after the deduction of all credits from the amount of the Kentucky judgment, there remained due and unpaid thereon the principal sum of $93,190.58,[3/] plus interest. From these

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[3/] This sum, which was less than that sought in the complaint ($93,965.12), was the amount shown to be due by plaintiff's accounting records, received in evidence.

findings the court concluded the Kentucky judgment was entitled to full faith and credit, and that plaintiff was entitled to judgment against defendant.

On September 3, 1970 judgment for the principal sum of $93,190.58, plus $8,364.17 interest, was entered in favor of plaintiff and against defendant.

On September 10th defendant moved for a new trial on the grounds of irregularity in the proceedings of the court, surprise, newly discovered evidence, insufficiency of the evidence to justify the judgment, and that the judgment was against law. (Code Civ. Proc. § 657, subds. 1, 3, 4, 6.) On October 9th the motion was argued and denied.

Defendant appeals from the judgment, contending (1) there was no substantial evidence to support the finding that defendant authorized McCann to represent him, and (2) the trial court should have granted a new trial on the ground of surprise.[4/]

4/ While no appeal lies from an order denying a motion for new trial (Code Civ. Proc. § 904.1) an appellate court can review such order on appeal from a judgment (Code Civ. Proc. § 906).

I. McCann's Authority To Represent Defendant, Individually

The motion of February 28, 1968 to dismiss and to strike part of the complaint, filed by McCann on behalf of all defendants in the Kentucky action, constituted a general appearance (Judson v. Superior Court, 21 Cal. 2d 11, 13 [1942], overruled on other grounds in Goodwine v. Superior Court, 63 Cal. 2d 481, 484-485 [1965]; MacPherson v. Superior Court, 22 Cal. App. 2d 425, 430 [1937]; Commonwealth Life Ins. Co. v. Combs, 65 S. W. 2d 696, 698 [Ky. App. 1933]; Johnson v. Holt's Adm'r, 31 S. W. 2d 895, 896-897 [Ky. App. 1930]; Martin v. Cole, 230 S. W. 535 [Ky. App. 1921] which conferred personal jurisdiction over the defendants. Dresser v. Superior Court, 231 Cal. App. 2d 68, 76 [1964]; Crabtree v. Superior Court, 197 Cal. App. 2d 821, 827 [1961]; Greene v. Commonwealth, 122 S. W. 2d 523, 527 [Ky. App. 1938]; Hudson v. Manning, 63 S. W. 2d 943, 945 [Ky. App. 1933].) The personal default judgment based upon such jurisdiction was subject to collateral attack in this action on the ground McCann was not authorized to enter an appearance for defendant Rosenthal, incividually. (Cagnon Co., Inc. v. Nevada Desert Inn, 45 Cal. 2d 448, 457 [1955].) However, both in California and Kentucky there is a presumption that an attorney entering the appearance of a defendant has authority to do so. (Voinich v. Rolleri, 203 Cal. 379, 382 [1928]; Sullivan v. Dunne, 198 Cal. 183, 190

[1926]; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 8 [1903]; Garrison v. McGowan, 48 Cal. 592, 600 [1874]; Wilson v. Barry, 102 Cal. App. 2d 778, 780 [1951]; Jones v. Baxter, 51 Cal. App. 589, 594 [1921]; Sachs v. Title Ins. & Trust Co., 202 S. W. 384, 386 [Ky. App. 1947]; King Const. Co. v. Mary Helen Coal Corp., 239 S. W. 799, 800 [Ky. Spp. 1922].) The presumption is disputable (Evid. Code §§ 601, 605) but the party denying the attorney's authority has the burden of proving lack of authority by a preponderance of the evidence. (Evid. Code §§ 115, 606, 660, 666; Garrison v. McGowan, supra, 48 Cal. at p. 600; Hicks v. Hicks, 264 Cal. App. 2d 890, 895 [1968]; Kallman v. Henderson, 234 Cal. App. 2d 91, 98 [1965]; Wilson v. Sharp, 175 Cal. App. 2d 691, 695 [1959]; Dale v. City Court of Merced, 105 Cal. App. 2d 602, 608 [1951]; People v. Western Meat Co., 13 Cal. App. 539, 545 [1910]; 6 Cal. Jur. 2d Rev. 121, "Attorneys at Law" § 66.)[5/]

Defendant Rosenthal attempted to sustain this burden by testifying that he did not employ or authorize McCann to represent

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5/ The law of the forum governs proof of facts. (Estate of Winder, 98 Cal. App. 2d 78, 84 [1950]; Restatement of the Law 2d, Conflict of Laws 365-366, 374 §§ 133, 135.)

him, individually. However, no formal contract is necessary to create the relationship of attorney and client.[6] (Brydonjack v. Rieck, 5 Cal. App. 2d 219, 222-223 [1935]; see also Arden v. State Bar, 52 Cal. 2d 310, 315 [1959].) The rules governing the attorney-client relationship are founded on the rules governing the relation of principla and agent. (Moving Picture etc. Union v. Glasgow Theaters, Inc., 6 Cal. App. 3d 395, 403 [1970]; Fidelity & Casualty Co. v. Abraham,

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[6] On this appeal, neither party discusses the conflict of laws question: Whether California or Kentucky law governs as to the creation of an attorney-client relationship between McCann and defendant. As a general rule, the law of the place of contracting determines the formalities required for the making of a contract, and the place where the offer is accepted is the place of contracting. (Smith v. Harris, 127 Cal. App. 2d 311, 314 [1954].) However, the record does not disclose facts sufficient to permit application of this rule to resolve the conflict of laws question. Under these circumstances, we are entitled to assume California law governs. (Wells v. Wells, 74 Cal. App. 2d 449, 453 [1946]; Rogers v. Rogers, 49 Cal. App. 2d 366, 370-371 [1942]; 11 Cal. Jur. 2d 86, "Conflict of Laws" § 22.)

70 Cal. App. 2d 776, 783 [1945].) The creation of an agency does not depend upon express appointment and acceptance thereof, but may be implied from the words and conduct of the parties and the circumstances of the particular case. (Ferroni v. Pacific Finance Corp., 21 Cal. 2d 773, 779 [1943]; Smith v. Schuttpelz, 1 Cal. 2d 158, 161 [1934]; Whiteman v. Leonard Realty Co., 189 Cal. App. 2d 373, 376 [1961]; Ramey v. Myers, 111 Cal. App. 2d 679, 685 [1952].)

We review the evidence in the light of these principles, bearing in mind that all conflicts must be resolved in favor of respondent-plaintiff and all legitimate inferences must be indulged to uphold the finding that defendant authorized McCann to act as his attorney. (Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429 [1935]; Straub v. Straub, 213 Cal. App. 2d 792, 797 [1963].)

Before plaintiff filed the Kentucky action, McCann had represented the limited partnerships and all of the partners in other matters. Therefore, when defendant telephoned him regarding plaintiff's action against the partnerships and defendant, McCann not unreasonably assumed he had authority to represent defendant, both as a parnter and individually. During their telephone conversation, defendant and McCann discussed defenses to the action, and the possibility of having the prayer for attorneys' fees stricken from the complaint. McCann told defendant he would file a motion, and defendant did not tell McCann not to do so. After

this conversation, McCann filed the motion seeking an order striking attorneys' fees and other relief. He then corresponded with defendant and telephoned him several times regarding the progress of the action, but defendant never raised the question of McCann's authority to represent him. Defendant testified he did not notice until some time after receiving a copy of the complaint that he was being sued in his individual capacity.[7/] From the evidence outlined it is inferable that McCann had actual authority to represent defendant because defendant, by want of ordinary care, allowed him to believe he had such authority. (Civ. Code §2316.)

We conclude there was sufficient evidence to support the finding. Defendant's testimony that he did not authorize McCann to represent him merely created a conflict in the evidence, and all questions as to conflict and preponderance of evidence are for the trial court. (Beeler v. American Trust Co., 24 Cal. 2d 1, 7 [1944]; Wadleigh v. Phelps, 149 Cal. 627, 637 [1906].) "An appellate court

---

7/ At a hearing to settle the proposed findings, the trial court commented: "The court did not and does not accept the testimony of Mr. Rosenthal. It is full of contradictions and weaknesses, and if I can use the expression often used by lawyers, it is full of holes."

has no right to retry a case on the facts. Our whole duty as to the factual showing is to determine whether there is substantial evidence to support the conclusion of the trier of fact even though there is contrary evidence equal to, or even greater than, that which favors the trial court's decision. We cannot weigh the evidence, or pass upon the credibility of the witnesses." (Kallman v. Henderson, supra, 234 Cal. App. 2d at p. 96.)

Since there was sufficient evidence of prior authorization, it was not necessary to establish ratification of McCann's acts by defendant. (Civ. Code § 2307.) However, the finding of ratification likewise is supported by the evidence. Ratification may be established by implication from conduct of the purported principal which is inconsistent with any reasonable intention on his part, other than that he intends approving and accepting the act of the purported agent. (Ballard v. Nye, 138 Cal. 588, 597 [1903]; Ralphs v. Hensler, 97 Cal. 296, 302-303 [1893], overruled on other grounds in Flores v. Arroyo, 56 Cal. 2d 492, 497 [1961]; Ford v. Lou Kum Shu, 26 Cal. App. 203, 211 [1914].) A ratification cannot take place until the principal is in full possession of all the material facts. (Promis v. Duke, 208 Cal. 420, 427 [1929]; Broecker v. Moxley, 136 Cal. App. 248, 254 [1934].) However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man on inquiry, he may be held to have ratified despite lack of full knowledge. (Hutchinson Co.

v. Gould, 180 Cal. 356, 358 [1919]; Ballard v. Nye, supra, 138 Cal. at p. 598; Reusche v. California Pac. Title Ins. Co., 321 Cal. App. 2d 731, 737 [1965]; Volandri v. Hlobil, 170 Cal. App. 2d 656, 659 [1959].)

When defendant received a copy of the personal default judgment against him in January 1969, he was put on notice that the Kentucky court had acquired personal jurisdiction over him, or at least believed that it had such jurisdiction. However, he did not then contact either McCann or plaintiff's attorneys to question the judgment or object to it. It was not until some time after the California action was filed (September 1969) that he finally telephoned McCann to ask how personal jurisdiction could have been acquired. He testified that he then learned, for the first time, that in February 1968 McCann had signed and filed a motion which constituted a general appearance. Only after this did defendant challenge entry of the appearance by the filing of an amended answer (February 1970) containing the affirmative defense of lack of personal jurisdiction. Under these circumstances, defendant may be held to have ratified in January 1969 McCann's act of entering the general appearance even though he testified that he did not actually learn of that appearance until almost a year later.

II. Trial Court's Refusal To Grant New Trial On Ground Of Surprise

Defendant bases his claim of surprise on the contention that after the trial court suggested McCann be further deposed, the court suddenly "reversed" that position and immediately rendered a decision from the bench without benefit of a further deposition. Defendant asserts he was thereby "legally surprised" and "trapped," and hence a new trial should have been granted on the ground of surprise.

The record shows: upon conclusion of defendant's testimony on July 23, 1970, the court suggested that McCann be further deposed, and continued the trial to July 30th. When counsel returned to court on that date, the following proceedings were had:

"THE COURT: The court and counsel had an informal discussion in chambers a few moments ago and the court gathers from that discussion that neither the plaintiff nor the defendant is insisting upon taking the deposition of Mr. McCann and that each side is willing to submit the matter to the court on the record as now made. Is that correct, gentlemen?

"MR. YOKAITIS: That is correct, your Honor.

"MR. ROSENTHAL: That is correct, your Honor.

"THE COURT: If you want the deposition, Mr. Rosenthal, I don t want to foreclose you . . . . You are both agreeable to submitting the matter now to the court?

"MR. YOKAITIS: I submit it.

"MR. ROSENTHAL: That is correct, I am also, your Honor."

"Surprise" as a ground for a new trial denotes some situation in which a party to an action is unexpectedly placed to his injury, without any negligence on his part. (Wade v. De Bernardi, 4 Cal. App. 3d 967, 971 [1970].) Where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable decision. He must act at the earliest possible moment, for the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court and no motion is made for a continuance or other relief. (Kauffman v. De Mutiis, 31 Cal. 2d 429, 432 [1948]; Schellhous v. Ball, 29 Cal. 605, 608 [1866]; Stanley v. Feather River Pine Hills, 112 Cal. App. 2d 101, 104 [1942]; Noble v. Tweedy, 90 Cal. App. 2d 738, 742-743 [1949]; Baker v. Berreman, 61 Cal. App. 2d 235, 241 [1943].) If defendant was surprised by the court's action on July 30th, he did not then so indicate but, on the contrary, expressly consented to submitting the matter without the deposition of McCann. He waited until after findings were signed and judgment entered, and then on September 10th filed a motion for new trial on several grounds, including surprise.

The granting or denial of a motion for new trial on the ground of surprise is a matter within the discretion of the trial court, and its determination will not be disturbed unless that discretion has been abused. (Kauffman v. De Mutiis, supra, 31 Cal. 2d at pp. 433-434; South Santa Clara etc. Dist. v. Johnson, 231 Cal. App. 2d 388, 407 [1964]; Adoption of Curtis, 195 Cal. App. 2d 179, 184 [1961].) In view of the circumstances, we cannot say the court abused its discretion in denying the motion for new trial.

The judgment is affirmed.

NOT FOR PUBLICATION.

DUNN, J.

We concur:

JEFFERSON, Acting P. J.

KINGSLEY, J.

APPENDIX C

Los Angeles, Cal. Jan 19 19 72

TITLE (Arkansas Louisiana Finance Corp.) vs. (Rosenthal) No. 38062

THE COURT:

PETITION FOR REHEARING DENIED.

Clay Robbins, Clerk

Clerk's Office
Court of Appeal
Second District
California State Building, Room 1201
Civic Center
Los Angeles, Calif. 90012

620-3180

Sigelman & Stein

250 North Canon Drive

Beverly Hills, Calif. 90210

APPENDIX D

William G. Sharp, County Clerk
Entered Book Page
Sep 3 70 6571 308

Filed
Sep 2 1970
Wiliam G. Sharp, County Clerk
By /s/ Miyahara
Deputy

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ARKANSAS LOUSIANA FINANCE CORPORATION, Plaintiff, vs. J. B. ROSENTHAL, Defendant.	No. 961 867 JUDGMENT

The above entitled action came on regularly for tiral on July 22, 1970 in Department 35 of the above entitled court, the Honorable Emil Gumpert, Judge presiding without a jury, and was regularly tried on said date and on July 23, 1970. Plaintiff appeared by Donald F. Yokaitis, Esq. and Defendant appeared by Rosenthal & Leon, Attorneys at Law by Jerome B. Rosenthal, Esq.

The court, having heard the oral testimony and examined the documentary evidence introduced

by the parties, the cause having been submitted for decision and the court, after hearing arguments of counsel, reading the Points and Authorities of counsel, being fully advised in the matter, the court, having announced its intended decision in favor of Plaintiff and against Defendant, J. B. ROSENTHAL, and the court, having made and caused to be filed its written Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff, Arkansas Louisiana Finance Corporation, a corporation is granted judgment against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal in the sum of $93,190.58 plus interest thereon at the rate of 7% per annum from May 22, 1969 through September 2, 1970 amounting to $8,364.17, making a total sum of $101,554.53.

2. Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, shall have their costs of suit herein in the sum of $97.65.

THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

DATED: September 2, 1970.

/s/ Emil Gumpert
EMIL GUMPERT, Judge
Superior Court

APPENDIX E

CLARK CIRCUIT COURT

ARKANSAS LOUSIANA FINANCE CORPORATION, A CORPORATION — PLAINTIFF

VS.

DEFAULT ORDER AND JUDGMENT

CIVIL ACTION
NC. 11-463

TOM ATKINS LINE CO., LTD., (d/b/a "MOAR LINE CO., LTD."), A LIMITED PARTNERSHIP COMPRISED OF TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED, AND J. B. ROSENTHAL AS LIMITED PARTNERS AND T. E. ATKINS AS THE GENERAL PARTNER; TOM ATKINS, PRODUCING CO., LTD., (d/b/a/ "MELCHER-ATKINS OIL") A LIMITED PARTNERSHIP COMPRISED OF TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED, AND J. B. ROSENTHAL AS LIMITED PARTNERS AND T. E. ATKINS AS THE GENERAL PARTNER, AND TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED J. B. ROSENTHAL AND T. E. ATKINS, INDIVIDUALLY — DEFENDANTS

* * * * *

This cause coming on to be heard, and it appearing to the Court that the defendants named in

the caption hereinabove, and each of them, have been duly served with Summons for a period of more than twenty (20) days last past and that defendants, and each of them, are now in default in the filing of any answer, motion or other pleading to the complaint filed herein as amended and the Court being advised, IT IS HEREBY ORDERED AND ADJUGED AS FOLLOWS:

1. Plaintiff is hereby awarded a personal judgment against defendants named in the caption, and each of them, jointly and severally

a) in the sum of Seven Thousand One Hundred Eighty Five Dollars and Fifty Nine Cents ($7,185.59) together with interest thereon at the rate of seven (7%) percent per annum from December 21, 1967, until paid; and

b) in the sum of Ninety Nine Thousand Ninety Dollars and Thirty Seven Cents ($99,090.37) together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid; and

2. Until the amount of the judgment awarded to Plaintiff herein is paid in full, Plaintiff is adjudged to be the owner of 12.375 percent (15 percent of 82.5 percent, the 82.5 percent being the so-called "working interest") of the gross proceeds payable by United Fuel Gas Company under a certain contract as supplemented, modified and amended, between said United Fuel Gas Company and Defendant

MOAR LINE CO., LTD., and Defendants Terrence P. Melcher as Executor of the Estate of Martin Melcher, deceased, and T. E. Atkins, partners doing business under the firm name of Melcher-Atkins Oil, said agreement being dated August 19, 1964, and within ten (10) days after entry of this Judgment, Defendants are hereby ordered and directed to forward an attested copy of this Default Order and Judgment to United Fuel Gas Company with written instructions to United Fuel Gas Company to make payment of 12.375 percent of the gross proceeds payable under the aforesaid contract to Plaintiff herein until said United Fuel Gas Company is notified in writing by Plaintiff that this Judgment has been fully paid and satisfied.

3. Plaintiff is the owner of the following described compressor equipment:

> "Three (3) skid-mounted Worthington Model HB two-cylinder, two-stage, 240 HP natural gas compressors, each driven by a Caterpillar Model G-342 turbocharged and aftercooled six-cylinder natural gas prime mover. Equipment common to each compressor to be one (1) 12-3/4" C. D. inlet srubber one (1) 10.3/4" C. D. second-stage auction scrubber, Model 6V Disler Cooler, and other equipment necessary to make such machine a self-contained unit.

UNIT NO. 1

Engine Serial No. 71B350

6½" compressor: Frame No. 179231, cylinder No. 178323

5½" compressor: Frame No. 179230, cylinder No. 178490

Disler Cooler No. 4725

UNIT NO. 2

Engine Serial No. 71B356

6½" compressor: Frame No. L79263, cylinder No. L77939

5½" compressor: Frame No. L79196, cylinder No. L79263

Disler Cooler No. 4726

UNIT NO. 3

Engine Serial No. 71B354

6½" compressor: Frame No. 179267

5½ compressor: Frame No. 179197

Disler Cooler No. 4727."

The aforesaid items of equipment are presently located in the Trapp Field, Clark County

Kentucky, and Defendants and each of them are hereby ordered and directed to assemble said equipment and deliver the same to Plaintiff at the nearest point on the nearest public road not later than ten (10) days after the date of entry of this Default Order and Judgment. All expenses involved in assembling and delivering said equipment to Plaintiff shall be borne and paid for by Defendants.

4. Upon delivery of said items of equipment to Plaintiff the same shall be sold within a reasonable time thereafter by Plaintiff at either public or private sale as Plaintiff may deem best, and the net proceeds received from said sale, after payment of all costs and expenses involved in said sale, shall be retained by Plaintiff and credited against the Judgment rendered herein in favor of Plaintiff against Defendants. Provided, however, that before any sale of said equipment is made at either public or private sale, Plaintiff shall give notice in writing of said sale or proposed sale at least ten (10) days before the time of the sale to Defendants. Said notice shall be mailed to each of Defendants at 250 North Canon Drive, Beverly Hills, California.

5. Defendants are obligated to and shall indemnify and hold Plaintiff harmless from any and all claims, demands and liabilities of every nature arising out of the assembling, removal and delivery of the equipment listed in paragraph 3 above to Plaintiff as directed herein.

6. All provisions of this Default Order and Judgment may be enforced in this Court

by appropriate action by Plaintiff to hold defendants, and each of them, in contempt of this Court for any violations of this Order and Judgment.

_____
JUDGE

The foregoing Order and Judgment may be entered and service of a copy and notice of entry thereof are hereby waived.

This Order and Judgment was prepared by

STOLL, KEENON & PARK
310 First National Bank Building
Lexington, Kentucky

By /s/ Keenon
ATTORNEYS FOR PLAINTIFF

and the same has been seen and approved by:

WHITE, McCANN & STEWART
Attorneys at Law
Codell Building
Winchester, Kentucky

By /s/ M. McCann
ATTORNEYS FOR DEFENDANTS

APPENDIX F

CLARK CIRCUIT COURT

ARKANSAS LOUISIANA FINANCE CORPORATION, a corporation, PLAINTIFF

VS. COMPLAINT No. #11463

TOM ATKINS LINE CO., LTD., (d/b/a "MOAR LINE CO., LTD."), a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner; TOM ATKINS PRODUCING CO., LTD., (d/b/a "MELCHER-ATKINS OIL"), a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner, and MARTIN MELCHER, J. B. ROSENTHAL and T. E. ATKINS, individually, DEFENDANTS

* * * * * * * * *

Plaintiff, ARKANSAS LOUISIANA FINANCE CORPORATION, a corporation, states that the following facts are true:

1. Under a certain contract and security agreement, dated February 2, 1965, Arkla Ingersoll Co., a division of Arkla Industries, Inc. (herein referred to as "Arkla") sold certain items of equipment listed in said contract to MOAR LINE CO., LTD., which is

an assumed name for TOM ATKINS LINE CO., LTD., a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner (said purchaser being referred to as "MOAR"). Said equipment so sold by Arkla to Moar is listed in full on Exhibit "A" to Exhibit "1" hereto. For good and valuable considerations which are set forth in said contract and security agreement, TOM ATKINS LINE CO., LTD. (d/b/a/ "MOAR LINE CO., LTD."), a limited partnership comprised of Martin Melcher and J. B. Rosenthal, as limited partners, and T. E. Atkins, as the general partner, TOM ATKINS PRODUCING CO., LTD. (d/b/a "MELCHER-ATKINS OIL"), a limited partnership comprised of Martin Melcher and J. B. Rosenthal, as limited partners, and T. E. Atkins, as the general partner, and MARTIN MELCHER, J. B. ROSENTHAL and T. E. ATKINS, individually, (all hereinafter referred to collectively as "Melcher-Rosenthal-Atkins Interests"), agreed and promised to pay to Arkla for said equipment the sum of Ninety-one Thousand Five Hundred ($91,500.00) Dollars. Also pursuant to said contract and security agreement, Arkla loaned to Moar the sum of Eight Thousand Five Hundred ($8,500.00) Dollars in cash and Melcher-Rosenthal-Atkins Interests agreed and promised to repay the whole of said two sums, in the aggregate amount of $100,000.00, together with interest on the unpaid principla balances due thereon from time to time at the rate of seven (7%) percent per annum from February 2, 1965, until paid. Pursuant to paragraph 5 of said contract and

security agreement, the entire principal and all interest on said indebtedness was to be paid in full on or before February 2, 1968. Payments have been made and applied on the principal and interest of said debt from time to time, and there is now due and owing on said debt the following:

a) A principal sum of $99,050.37, together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid;

b) Accrued and unpaid interest on said debt to December 31, 1967, in the sum of $7,185.59.

On February 2, 1965, all right, title and interest of Arkla in and to said contract and security agreement was assigned by Arkla to Plaintiff, which is now and has been at all times since February 2, 1965, the owner and holder of said debts and all other rights reserved in favor of Arkla under said contract and security agreement. A complete copy of said contract and security agreement, and the assignment of the same from Arkla to Plaintiff, is attached and made a part hereof, marked Exhibit "1" for purposes of identification. The unpaid balances of principal and interest set forth above were not paid on or before February 2, 1968, the same have not been paid to date, and pursuant to said contract and security agreement, Plaintiff is entitled to have the Court adjudge that Defendants, and each of them, are now indebted to Plaintiff in the principal sum

of $99,090.37, together with interest thereon at the rate of seven (7%) percent from December 31, 1967, until paid, plus accrued and unpaid interest to December 31, 1967, on the principal of said debt, in the sum of $7,185.59.

2. Under paragraph 4 of Exhibit "1" hereto, and the assignment to Plaintiff attached thereto, there was assigned to Plaintiff, and it is now the owner of 12.375 percent of the gross proceeds payable by United Fuel Gas Company under the United Fuel Gas contract referred to in Exhibit "1", and Plaintiff is entitled to have the Court adjudge that Plaintiff is entitled to have said percentage of said proceeds paid to it by United Fuel Gas Company until the aforesaid indebtedness to Plaintiff is fully paid.

3. Under paragraph 6 of Exhibit "1" hereto and the assignment to Plaintiff attached thereto, and until all of the aforesaid indebtedness is paid to Plaintiff, (a) Plaintiff is the owner of the title in and to all of said equipment described in Exhibit "1", and (b) Plaintiff is the holder of a security interest in all contract rights owned by the Melcher-Rosenthal-Atkins Interests, or any of them, under the United Fuel Gas contract referred to in Exhibit "1" hereto. Defendants have defaulted in the payment of the aforesaid indebtedness as required by Exhibit "1" hereto, and under paragraph 6 (b) of Exhibit "1" hereto Plaintiff is entitled to remove said equipment on which it holds title and a security interest pursuant to Exhibit "1", and to have the Court adjudge that Defendants are obligated to indemnify

Plaintiff for any claims asserted by reason of said removal and to hold Plaintiff harmless from and against all claims, demands and liabilities arising out of such removal. Upon removal of said equipment by Plaintiff, and upon the giving of notice, in writing, to Defendants at 250 North Canon Drive, Beverly Hills, California, ten (10) days in advance of any sale, then, under paragraph 8 of Exhibit "1", Plaintiff is entitled to sell said equipment at either public or private sale, and to apply the proceeds therefrom, after the payment of all costs and expenses of the sale or sales, to the aforesaid indebtedness of Defendants to Plaintiff.

4. Paragraph 3 of Exhibit "1" provides that in the event of the default of Defendants making payment of the entire indebtedness due Plaintiff on February 2, 1968, Plaintiff is entitled to recover from Defendants a reasonable attorney's fee for collection of said indebtedness. Pursuant thereto, Plaintiff states that it is entitled to have the Court adjudge that Defendants, and each of them, are indebted to Plaintiff for a reasonable attorney's fee in the collection of said indebtedness.

WHEREFORE, Plaintiff prays as follows:

A) That the Court adjudge and determine that Defendants, and each of them, are indebted to Plaintiff in the principal sum of $99,090.37, together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid, plus accrued and unpaid interest to December 31, 1967, on the principal of said debt

in the sum of $7,185.59, and for personal judgment in said amounts against each Defendant who is personally served with summons herein; and

B) That the Court adjudge that Plaintiff is the owner of all rights retained by Arkla in the contract and security agreement, a copy of which is attached and marked Exhibit "1" hereto; and

C) That the Court adjudge that Plaintiff is the owner of 12.375 percent of the gross proceeds payable by United Fuel Gas Company under the United Fuel Gas contract referred to in Exhibit "1", and that Plaintiff is entitled to have said percentage of said proceeds paid to it by United Fuel Gas Company until the indebtedness to Plaintiff set forth above is fully paid.

D) That the Court adjudge that until all of the aforesaid indebtedness to Plaintiff is paid in full, (1) Plaintiff is the owner of the title in and to all of the equipment listed and described on Exhibit "A" to Exhibit "1" hereto, and (2) Plaintiff is the holder of a security interest in all contract rights owned by all Defendants, or any of them, under the United Fuel Gas contract referred to in Exhibit "1" hereto; and

E) That the Court adjudge that Defendants have defaulted in the payment of the aforesaid indebtedness as required by Exhibit "1" hereto, and that under the provisions of Exhibit "1" hereto, Plaintiff is entitled to remove

the equipment listed on Exhibit "A" to Exhibit "1" hereto from the premises where the same is now installed, and to sell the same at either private or public sale, upon giving notice of said sale at least ten (10) days prior to such sale to Defendants at the address set forth in paragraph 8 of Exhibit "1" hereto, and to apply the proceeds of such sale to the payment of the aforesaid indebtedness to Plaintiff, after the payment of all costs and expenses of such sale or sales; and

F) That the Court adjudge that Defendants, and each of them, shall indemnify and hold Plaintiff harmless from any and all claims, demands and liabilities arising out of such removal of said equipment from the premises where the same is now installed; and

G) That the Court adjudge that Defendants, and each of them, are indebted to Plaintiff for a reasonable attorney's fee for collection of the aforesaid indebtedness, and that the Court fix the amount of said fee herein, and award a personal judgment in said amount against all Defendants who are personally served with summons herein; and

H) For its costs herein expended, and for all proper relief to which it may appear entitled.

STOLL, KEENON & PARK
310 First National Bank Building
Lexington, Kentucky 40507

By /s/ Kennon
Attorneys for Plaintiff

ARK-L.A. Finance Corporation VS.
J. B. ROSENTHAL

STATE OF CALIFORNIA, County of Los Angeles
No. C 961 867

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original DEFENDANT'S EXHIBIT "B"

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court.

Dated: April 10, 1972

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By /s/ B. McGowan, Deputy

APPENDIX G

December 17, 1971

Honorable Edwin Jefferson, Presiding Justice
Court of Appeal of the State of California
Second Appellate District, Division Four
217 West First Street
Los Angeles, California 90012

Re: Arkansas Louisiana Finance Corporation v. J. B. Rosenthal, No. 38062
(Argued December 17, 1971)

Dear Mr. Presiding Justice:

Upon return to my office I encountered a decision which was reported today for the first time in the Daily Journal Weekly Supplement, and which is sufficiently pertinent to the above entitled case - now under submission - as to make it encumbent upon me to bring it to the court's attention: Promotus Enterprises, Inc. v. Jiminez, filed on November 26, 1971, First App. Dist.

That case states that "In order for [an] appearance to be effectual, in the absence of service of process, it must be with knowledge that there is an action pending and with the intention to appear therein." The case further notes that, as in Fazzi v. Peters, 68 Cal. 2d 590, where a complaint fails to set forth an action against a partner individually, the judgment is void as to such an individual.

In the case at bench the complaint for personal judgment is only stated to be made "against each defendant who is personally served with summons herein."

Since Rosenthal was never served with a summons, any appearance by McCann in Kentucky, even if he were authorized, is completely ineffectual; there was at no time a de jure action set forth against Rosenthal. Any act of McCann's was therefore a nullity in regard to the liability of Rosenthal individually, under the principle of Promotus Enterprises.

Expressed in another manner, because the explicit condition precedent of service, which plaintiff chose to include in its prayer for relief in Kentucky was never met, there could never be valid judgment against Rosenthal. This is true regardless of whether or not he read the complaint. The only way this defect could be cured would have been for plaintiff to amend its complaint or serve the summons. This having not been done, Rosenthal would be entitled to rely on the well-known rule that a court, in a default case, cannot award relief in excess of that prayed for in the complaint. There could not be an "effectual" appearance as required in Promotus Enterprises.

The Kentucky court, bound by the complaint pleaded by plaintiff, therefore acted in excess of jurisdiction and its judgment was void.

Respectfully submitted,
PAUL S. SIGELMAN

PSS:se
cc: Donald F. Yokaitis, Esq.
William G. Sharp

FILE COPY

FILED

NOV 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA FINANCE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

DONALD F. YOKAITIS,
880 East Colorado Boulevard,
Suite 502,
Pasadena, Calif. 91106,
Attorney for Respondent Arkansas Louisiana Finance Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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J. B. ROSENTHAL,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinions Below.

The California Supreme Court denied Petitioner's petition for hearing, without any written opinion (Petitioner's Appendix A).

The opinion of the Court of Appeal of the State of California, Second Appellate District (Petitioner's Appendix B), was certified for nonpublication and not therefore officially reported.

The judgment of the trial court, the Superior Court of the State of California for the County of Los Angeles, Case No. 961867 (Petitioner's Appendix D), was not officially reported. Annexed hereto are the

following documents filed in and a part of Case No. 961867:

1. Complaint—Appendix I.
2. Answer to Complaint—Appendix II.
3. Proposed First Amended Answer—Appendix III.
4. Amended Proposed First Amended Answer—Appendix IV.
5. Findings of Fact and Conclusions of Law—Appendix V.

Jurisdiction.

The alleged basis of jurisdiction, denial of federal due process, is set forth in the petition.

Questions Presented.

1. Whether Petitioner timely raised a federal question of denial of due process.

2. Whether Petitioner was denied federal due process by a Kentucky judgment rendered against him personally.

Statement.

The facts of the case are stated in the decision and opinion of the Court of Appeal of the State of California, Second Appellate District (Petitioner's Appendix B).

ARGUMENT.

Petitioner, a lawyer of many years standing and a resident of the State of California, in the latest and newest of many successive theories, seeks to attack a prior and final Kentucky judgment rendered against him on January 20, 1969, not by direct attack on that Kentucky judgment, which he has never done, but rather by attack upon the California judgment rendered against him on September 2, 1970, and based upon the prior Kentucky judgment.

Petitioner, by his petition to this Court, raises the alleged issue and argument that federal due process was denied to him by the judgment granted by the Kentucky court against him personally as being in excess of the prayer of the complaint which he allegedly relied upon.

1. Petitioner Has Not, and Did Not, Timely Raise the Issue of Denial of Federal Due Process.

A. Petitioner in no way or manner ever raised the due process issue in any of his many verified written answers filed with the California trial court, or in any way or manner ever raised the issue during the trial, or by way of or during his motion for a new trial after the trial court had rendered judgment against him. In fact, and to the very contrary, Petitioner by way of his answers to the complaint filed by Respondent in the California action to all times admitted expressly, and the trial court so found, that a valid Kentucky judgment had been rendered against him. Petitioner contested primarily the two issues as to whether or not the Kentucky judgment was personal against him and the amount owing by him pursuant to the Ken-

tucky judgment. (Respondent's Appendix I, II, III, IV and V).

B. Petitioner in no way or manner ever raised the due process issue in his written briefs filed with or oral argument made to the Appellate Court of the State of California.

C. Petitioner in no way or manner ever, at any time during trial, or in arguments of the California Appellate Court, offered any evidence, written or oral, that he at any time, in any manner, relied upon the prayer of the Kentucky complaint against him.

D. The simple truth of the matter is that Petitioner, on appeal, has developed a late and new theory and approach to the case which was never raised or presented at trial, and therefore the court and the Respondent never addressed themselves to this issue. Ordinarily, an appellate court does not give consideration to issues not raised below except where the obvious result would be a plaint miscarriage of justice. *Hormel v. Helvering*, 61 S.Ct. 719, 312 U.S. 552 (1941). The United States Supreme Court will not undertake to review what the court below did not decide. *Walters v. City of St. Louis, Mo.*, 74 S.Ct. 505, 347 U.S. 231 (1954). Only the constitutional issues raised in the lower courts are before the Supreme Court on appeal. *Shelley v. Kraemer*, 68 S.Ct. 836, 334 U.S. 1. And finally, as stated by the court in *Helvering v. Rubenstein*, 124 F.2d 966 (CCA 8, 1942),

> "The right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below is a right to prevent a clear miscarriage of justice apparent from the record and not a right to afford a defeated litigant an-

other day in court because he thinks that if he were given another opportunity to try his case again upon a different theory he might prevail."

For this reason alone, Petitioner's failure to timely present the matter for rebuttal, argument and decision at the trial level, Petitioner should be denied the Writ herein petitioned for.

2. Petitioner Was Not Denied Federal Due Process.

A. Petitioner argues denial of federal due process alleging a Kentucky default judgment against him granting different relief than the prayer of the complaint in an action that Petitioner was not personally served with process. Petitioner, in the foregoing argument, ignores the significant facts of the case both in Kentucky and in California. However, the facts, as borne out by the opinion of the California Court of Appeal (Petitioner's Appendix B) and the Findings of Fact by the California trial court (Respondent's Appendix V) reflect the following:

(1) Petitioner entered a general appearance, by way of demurrer to the complaint, in the Kentucky action by and through a Kentucky lawyer who at all times then and thereafter was acting with the express knowledge, authorization and consent of Petitioner and on his behalf. The filing of a demurrer to the petition constitutes an appearance in the action. *Chapin v. Fulkerson*, 24 S.W. 1066, 95 Ky. 277 (1894). Jurisdiction over the person of a defendant may be acquired by service of process or by his voluntary appearance. *Hudson v. Manning*, 63 S.W.2d 943, 250 Ky. 760 (1933).

(2) Petitioner's appearance in the Kentucky action, by way of a demurrer to the complaint, resulted in the exclusion of attorney's fees from the complaint and the judgment thereafter rendered, all of which Petitioner was the beneficiary of.

(3) The Kentucky judgment against petitioner was seen, approved and signed by Petitioner's attorneys in Kentucky prior to its signing and entering by the Kentucky court. (Petitioner's Appendix E). The judgment clearly recited it to be a personal judgment and was not a default judgment in the usual sense, but rather a consent judgment after personal appearance. There was no evidence or argument, written or oral, offered or intimated to the California trial court that Petitioner relied upon the prayer of the Kentucky complaint. It therefore simply doesn't lie in Petitioner's mouth thereafter, for the first time in argument to the United States Supreme Court, to claim and argue that Petitioner relied upon the prayer of the complaint in the Kentucky action.

As the court stated in *Little v. Mann,* 195 S.W.2d 321, 302 Ky. 661 (1946), one may not complain on an appeal of a judgment to which he has consented unless it is on the ground of fraud or mistake.

3. The Cases Cited by Petitioner Are Not Applicable to the Facts of the Present Case.

Each of the cases cited by Petitioner are not applicable to the facts of the present case in that none of the cited cases involved judgment consented to by the defendant. Each of the cited cases involved a true default situation in one form or another. In fact, the court, in the case of *Sylvan Beach v. Koch,* 140 F.2d 852 (1944), cited by Petitioner, which involved a

nonappearance situation and an award in excess of the complaint and prayer, stated "a court may not, without *consent* (emphasis added) of all parties affected, enter a judgment which goes beyond the claim asserted in the pleadings. The case of *Gentry v. U.S.*, 101 Fed. 51 (Eighth Cir. 1900) involved a jury award, after trial, as to an issue not properly before the trier of fact. The case of *Reynolds v. Stockton*, 140 U.S. 254 (1891) involved a case tried, in the absence of one of the answering defendants, where the pleadings were amended during trial and a judgment in excess of the original pleadings was not allowed against the answering defendant who did not appear at the trial. The case of *Standard Oil Co. v. State of Missouri*, 224 U.S. 270 (1911) involved a fine, after trial, which was no part of the issues of the case as pleaded and tried. The Appellate Court affirmed the fine since the statute, under which the case was tried, provided for the fine if the primary issue was found against the party and therefore held that the party was on notice of the issue. The *Windsor v. McVeigh*, 93 U.S. 274 (1876) case involved a case where the defendant's answer to the complaint had been stricken on motion because the defendant was a "rebel" in the Civil War. The appellate court held that this was an excess of jurisdiction to strike the answer.

Conclusion.

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

DONALD F. YOKAITIS,
Attorney for Respondent Arkansas Louisiana Finance Corporation.

APPENDIX I.

Complaint on Foreign Judgment for Money.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, v. J. B. Rosenthal, Defendant. No. 961867.

Filed: Sept. 25, 1969.

Plaintiff complains of Defendant above named and for cause of action alleges as follows:

I

Defendant, J. B. ROSENTHAL, is a resident of the County of Los Angeles, State of California.

II

At all times herein mentioned, the Clark Circuit Court of the State of Kentucky, for the County of Clark, was and now is a court of general jurisdiction.

III

On or about January 20, 1969, a judgment was duly given and made by said Clark Circuit Court in favor of Plaintiff against Defendant J. B. ROSENTHAL. A true and correct copy of said judgment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though fully set forth.

IV

Said judgment, Exhibit "A" herein, has become final, has never been vacated, modified or set aside, and the time for appeal therefrom has expired.

V

By said judgment, Exhibit "A" hereof, it was ordered and adjudged that Defendant J. B. ROSENTHAL pay to Plaintiff the sum of $106,275.96 together with interest thereon at the rate of 7% per annum from December 31, 1967 until paid.

VI

On or about February 20, 1969 an order re sale of equipment was duly given and made by said Clark Circuit Court. A true and correct copy of said order is attached hereto, marked Exhibit "B", and incorporated herein by reference as though fully set forth.

VII

On or about May 22, 1969, an order re approving and confirming report of sale and credit on the default judgment was duly given and made by said Clark Circuit Court. A true and correct copy of said order is attached hereto, marked Exhibit "C", and incorporated herein by reference as though fully set forth. Except for the credit referred to in this paragraph, no part of the judgment referred to in paragraph III of this complaint has been paid.

VIII

There is now due, owing and unpaid from the Defendant, J. B. ROSENTHAL, to Plaintiff on said judgment, the sum of $93,965.12, together with interest thereon at the rate of 7% per annum from May 22, 1969.

WHEREFORE, Plaintiff prays judgment against Defendant J. B. ROSENTHAL as follows:

1. For the principal sum of $93,965.12 together with interest thereon at the rate of 7% per annum from and after May 22, 1969;

2. For Plaintiff's costs of suit herein; and

3. For such other and further relief as the court may deem just and proper.

DATED: September 5, 1969.

/s/ Donald F. Yokaitis
Donald F. Yokaitis
Attorney for Plaintiff

APPENDIX II.

Answer to Complaint.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, v. J. B. ROSENTHAL, Defendant. No. 961,867.

Filed: Oct. 27, 1969.

Comes now JEROME B. ROSENTHAL, and for answer to plaintiff's complaint on file herein, alleges:

I

Answering Paragraph VII, although this answering defendant has not paid any sums toward the said judgment, he has no way of knowing whether any part of said judgment has been paid, or reduced by virtue of the rights granted to plaintiff under Exhibit "A."

II

Answering Paragraph VIII, although not denying that a judgment was obtained against defendant by plaintiff, he has no information or belief on the specific sum referred to in Paragraph VIII, since it could have been reduced by the right to proceeds granted to plaintiff in Exhibit "A." Therefore, basing his denial thereon, and only on that ground, denies that the particular sum set forth in Paragraph VIII, i. e., $93,-965.12, is due.

WHEREFORE, defendant admits that judgment has obtained against him as set forth in the complaint, he prays for a determination by this Court of the exact amount due from him to the plaintiff.

DATED: October 23, 1969.

ROSENTHAL AND LEON

/s/ Gerald Krupp

Gerald Krupp

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX III.

Proposed First Amended Answer.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

Filed: Feb. 9 ,1970.

COMES NOW Jerome B. Rosenthal, sued herein as J. B. Rosenthal, and for First Amended Answer to plaintiff's Complaint on file herein, alleges:

I

Answering paragraph VIII, defendant denies owing the sum of $93,965.12 or any other sum or sums or at all.

FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

II

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(b).

FOR A SECOND SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

III

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(d).

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint; that it be dismissed;

and for costs of suit and for such other relief as appears just.

DATED: February 9, 1970.

ROSENTHAL AND LEON

/s/ By Jerome B. Rosenthal

Jerome B. Rosenthal

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX IV.

Amended Proposed First Amended Answer.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

COMES NOW Jerome B. Rosenthal, sued herein as J. B. Rosenthal, and for First Amended Answer to plaintiff's Complaint on file herein, alleges:

I

Answering paragraph VIII, defendant denies owing the sum of $93,965.12 or any other sum or sums or at all.

FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

II

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(b).

FOR A SECOND SEPARATE AND AFFIRMATIVE DEFENDANT ALLEGES:

III

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580 (d).

FOR A THIRD SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

IV

That the Kentucky Court rendering the judgment referred to in plaintiff's Complaint lacked the juris-

diction over the person of this answering defendant, necessary for the entry of a valid in personam judgment against this defendant. Hence the purported in personam judgment is invalid and void.

FOR A FOURTH SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

V

That the Kentucky Court rendering the judgment referred to in plaintiff's Complaint exceeded its jurisdiction in purporting to render judgment against this defendant for any amount in excess of the value or proceeds of the security in the transaction.

WHEREFORE, this defendant prays that plaintiff take nothing by its Complaint; that it be dismissed; and for costs of suit and for such other relief as appears just.

DATED: February 18, 1970.

ROSENTHAL AND LEON
/s/ By Jerome B. Rosenthal
Jerome B. Rosenthal

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX V.

Proposed Findings of Fact and Conclusions of Law.

Superior Court of the State of California, For the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

Filed: Sept. 2, 1970.

The above entitled action came on regularly for trial on July 22, 1970 in Department 35 of the above entitled court, the Honorable Emil Gumpert, Judge presiding without a jury, and was regularly tried on said date and on July 23, 1970. Plaintiff appeared by Donald F. Yokaitis, Esq. and Defendant appeared by Rosenthal & Leon, Attorneys At Law by Jerome B. Rosenthal, Esq.

The court having heard the oral testimony and examined the documentary evidence introduced by the parties, the cause having been submitted for decision and the court, after hearing arguments of counsel reading the Points and Authorities of counsel, being fully advised in the matter, the court having announced its intended decision in favor of Plaintiff and against Defendant, J. B. Rosenthal, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

The allegations contained in Paragraphs I, II, III, IV, V, VI and VII of the complaint are true.

II

The allegations contained in Paragraphs II, III, IV and V of the amended first amended answer dated February 18, 1970 are not true.

III

The judgment duly given and made by the Clark Circuit Court, State of Kentucky, dated January 20, 1969, case No. 11463, in favor of Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, herein called Plaintiff, and against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal, herein called Defendant, was and is a valid in personam judgment against Defendant and said court, in said case, had, at all times from and after February 27, 1968, personal jurisdiction over the person of Defendant.

IV

The judgment referred to in Finding No. III did not exceed the jurisdiction of the court rendering same, but rather was within the jurisdiction of said court.

V

The said Clark Circuit Court, State of Kentucky, in said case number 11463, acquired in personam jurisdiction over the person of Defendant on or about February 27, 1968 when the Defendant, by and through his attorneys at law, White, McCann & Stewart by Marshall McCann, Jr., filed a written motion with said court which constituted a general appearance in case number 11463 on behalf of Defendant.

VI

At all times from and after February 27, 1968, Attorneys At Law, White, McCann & Stewart by Marshall McCann, Jr. acted as attorneys at law on behalf of Defendant in case number 11463 with the express and implied authorization of Defendant to so act and all of said acts by said attorneys were from time to time between February 27, 1968 and November 3, 1969, confirmed, ratified, acknowledged and consented to by Defendant without any protest or reservation whatsoever.

VII

There is now due, owing and unpaid from Defendant to Plaintiff on said Kentucky judgment, after deduction of all credits, the principal sum of $93,190.58 plus interest thereon at the rate of 7% per annum from May 22, 1969.

VIII

Except as specifically found herein, all of the allegations of the complaint are true and none of the allegations and denials of the answer are true.

IX

In the event that it claimed or held that any of the following Conclusions of Law be Findings of Fact, they are incorporated herein, hereat, verbatim.

CONCLUSIONS OF LAW

From its Findings of Fact, the court makes the following Conclusions of Law:

I

In the event that it is claimed or held that any of the foregoing Findings of Fact are Conclusions of Law, they are incorporated herein, hereat, verbatim.

II

The judgment duly given and made by the Clark Circuit Court, State of Kentucky, dated January 20, 1969, case number 11463, in favor of Plaintiff and against Defendant is entitled to and hereby is accorded full faith and credit in the present action.

III

The defenses pled by Defendant in Paragraphs II and III of the amended first amended answer dated February 18, 1970 are not permitted defenses in the herein action which is based upon the judgment rendered in the prior Kentucky action.

IV

Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, is entitled to judgment against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal, in the principal sum of $93,190.58 together with interest thereon at the rate of 7% per annum from May 22, 1969.

V

Plaintiff shall have its costs of suit herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 2, 1970.

/s/ Emil Gumpert,
Emil Gumpert, Judge
Superior Court

OMITTING HEREFROM PROOF OF SERVICE.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

PETITION FOR CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

JEROME B. ROSENTHAL
250 North Canon Drive
Beverly Hills, California 90210
(213) 272-5436

In Propria Persona, Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

OPINIONS BELOW

The opinions below are set forth in the petition.

QUESTIONS PRESENTED

The questions presented are set forth in the petition.

STATEMENT

The facts presented are set forth in the petition.

ARGUMENT

I

IN ORDER TO AVOID A GROSS INJUSTICE THE SUPREME COURT SHOULD CONSIDER THE ISSUES PRESENTED, EVEN ASSUMING SUCH ISSUES WERE NOT RAISED BEFORE THE TRIAL COURT

Even if the questions presented in the instant petition were not raised at the trial court level, issues involving public policy may be considered for the first time on appeal. Mulligan v. Andrews, 211 F. 2d 28, 93 U.S. App. D.C. 375 (D.C. Cir., 1954); Gomez v. Williams, 420 F. 2d 1364 (10th Cir., 1970);

4 Corpus Juris Secundum 703, Appeal and Error §234.

Default judgments are a useful means of alleviating conjestion in the courts and thereby further the efficient administration of justice. Consequently, the continued, unimpaired, availability of default judgments is a matter of great public concern.

The reliability of default judgments in this regard is seriously threatened by the judgments under review in the instant petition. Even where a court has jurisdiction over a party, that court cannot, consistent with the Fourteenth Amendment, where a party defaults, grant greater or different relief than that specified in the complaint and prayer. For a court to do so would destroy the reliability of the default judgment procedure, since a party who choses to default would then be forced to do so at his peril.

The arguments presented in the instant petition involve the due process clause of the Fourteenth Amendment. Consideration of a question of this fundamental nature may be undertaken for the first time on appeal when necessary to serve the ends of substantial justice, and to prevent the denial of fundamental rights. Daugharty v. Gladden, 257 F. 2d 750, 758 (9th Cir., 1958); Founding Church of Scientology v. United States, 409 F. 2d 1146, 1164 (D.C. Cir., 1969); 5 Am. Jurisprudence 2d 34, Appeal and Error §549.

II

THE ISSUES RAISED IN THE INSTANT PETITION WERE RAISED, IN SUBSTANCE, BEFORE THE TRIAL COURT

Petitioner submits that the questions presented by the instant petition were, in substance, raised at the trial court level and at every other stage of the proceedings below. Petitioner, at all stages below challenged the personal jurisdiction asserted over petitioner by the Kentucky Court. To argue that a court lacks personal jurisdiction over a party is to argue that any purported exercise of that court's powers over such person would violate the due process clause of the Fourteenth Amendment.

The assertion that a court lacks personal jurisdiction is sufficiently broad so as to include the assertion that an exercise of jurisdiction in excess of a court's lawful authority violates due process.

The due process clause is violated where no notice appropriate to the matter to be tried is given to a party. Petitioner was never put on notice that a personal judgment would issue against him since the complaint in the Kentucky action sounded quasi in rem and specifically sought personal judgments only against defendants who were personally served with summons. It is an

undisputed fact that petitioner was never personally served with summons. See, Petition page 5, et. seq., and the Kentucky Complaint at Petition Appendix "F", page 30.

The Kentucky Court exceeded its jurisdiction by awarding, in a default matter, greater or different relief than that specified and sought in the complaint and prayer. An assertion that the Kentucky Court lacked personal jurisdiction altogether and that the Kentucky Court issued a judgment in violation of the Fourteenth Amendment includes the contention that due process was violated by a judgment issued in the excessive exercise of the Kentucky Court's jurisdiction. For that reason, and also because neither the courts below nor Respondent were misled, this Court should consider the issues presented in the instant petition.

III

THE DEFAULT ORDER AND JUDGMENT OF THE KENTUCKY COURT (PETITION APPENDIX "E", PAGE 24), IS NOT A CONSENT JUDGMENT, BUT ON THE CONTRARY IS A "TRUE" DEFAULT JUDGMENT

The judgment of the Kentucky Court is entitled, "Default Order and Judgment." (Petition Appendix "E", page 24.) That

judgment reads in material part as follows:

> "This cause coming on to be heard, and it appearing to the Court that the defendants named in the caption hereinabove, and each of them, have been duly served with Summons for a period of more than twenty (20) days last past and that defendants, and each of them, are now in default of the filing of any answer, motion of other pleading to the complaint filed herein as amended and the court being advised, IT BEING HEREBY ORDERED AND ADJUDGED AS FOLLOWS:" (Emphasis added.)

Despite the foregoing recital, it is an indisputable fact that petitioner was never personally served with summons. It is clear, moreover, that the referenced judgment is in fact a default judgment. Thus, the Kentucky Court, itself characterizes the judgment as a default judgment, as quoted immediately above.

The Superior Court In and For the County of Los Angeles,(California), determined that the Kentucky Court had acquired personal jurisdiction over Petitioner since an attorney (McCann), who had been hired by the general partner filed a demurrer to the complaint which was determined to be a general appearance according to Kentucky law. (See, Respondent's Brief In Opposition, page 5.) As set forth in

the opinion of the California Court of Appeals (Petition Appendix "B" -2 at page 17 thereof), Petitioner was not aware that the Kentucky Court's Default Order and Judgment Awarded a judgment in personam against him until approximately nine months after the Kentucky Court's Default Order and Judgment was entered.

Under these facts the Kentucky Court's Default Order and Judgment cannot be considered in the nature of a consent judgment. An attorney has no power to surrender substantial legal rights of his client in the absence of express authority. Himmelfarb v. U.S., 175 F. 2d 924, cert. den. 338 U.S. 860 (9th Cir., 1949). Attorney McCann may have been authorized by Petitioner to handle minor matters of procedure in the Kentucky action. However, McCann was never authorized to consent to a judgment and no court below found that McCann was ever authorized to consent to a judgment. The authority to waive a substantial right cannot be implied from the mere relationship of attorney and client. Bommarito v. Southern Canning Co., 208 F. 2d 56 (8th Cir., 1953). Accordingly, it is clear that Petitioner never consented to the Kentucky Court's Default Order and Judgment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

J. B. ROSENTHAL

In Propria Persona,
Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA FINANCE CORPORATION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Jerome B. Rosenthal
250 North Canon Drive
Beverly Hills, California 90210
(213) 276-5436

In Propria Persona, Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINIONS BELOW

The opinions below are set forth in the Petition for Certiorari at page 2 thereof.

This Honorable Court denied Petitioner's Petition for Certiorari December 1, 1972. This Petition for Rehearing is brought within twenty-five days thereafter pursuant to Rule 58, Supreme

Court Rules, for the reason that substantial grounds available in support of the Petition for Certiorari, were not included in the Questions Presented by the Petition for Certiorari.

QUESTION PRESENTED BY PETITION FOR REHEARING

Is the due process clause of the Fourteenth Amendment violated:

- where the defendant, by his own acts, has not clearly, overtly or intentionally authorized an attorney to appear on the defendant's behalf

- where that attorney, who merely "assumes" he has authority from defendant, files a noticed motion purportedly on behalf of the defendant

- where the courts assume or imply authorization, and

- where a judgment by default (against defendant's substantial and fundamental rights), for failing to file answer, issues personally against such defendant, despite the fact that such defendant had not even any of the so-called "minimum contacts" with the forum jurisdiction?

STATEMENT

The facts of the case are set forth in specific detail in the Petition for Certiorari at page 5, et seq., thereof. These relevant pages of the Petition for Certiorari are also, for convenience annexed hereto as Appendix A.

ARGUMENT, GROUNDS FOR PETITION FOR REHEARING

I

Although, at first glance it might appear otherwise, the issues presented by this case do not merely involve an isolated injustice to your Petitioner. The due process clause of the Fourteenth Amendment requires that the rights of no man be sacrificed at the altar of mere judicial administrative convenience. An efficient system of justice must above all, be just, fair, careful, and must appear to be just, fair, and careful.

It is common knowledge that our courts are congested and burdened by the weight of heavy case loads. As a result, the default judgment procedure has taken on increased importance. It is one means of alleviating this congestion in the courts, by efficiently resolving uncontested matters. Nevertheless, the courts must assume the special responsibility

of assuring each party litigant that he may rely on the fact that the default procedure is just.

In order to comport with due process the default judgment procedure must satisfy two fundamental requirements. Firstly, the court purporting to issue a default judgment must have personal jurisdiction over the defendant. Secondly, the judgment awarded cannot exceed or differ from the relief sought by the complaint and prayer.

Petitioner submits that in the instant case neither of these fundamental requisites were met.

In the name of judicial economy, courts have followed the principle that an attorney who purports to act as the representative of a particular client is presumed to be authorized by that client. While this principle sometimes serves to further the efficient administration of justice, in this default judgment context the presumption operated in a blantly unconstitutional fashion. Legal fictions while sometimes practical in effect can trample basic freedoms. Petitioner never authorized an attorney to represent him individually. Nor was Petitioner aware of the assertion of such personal jurisdiction until nearly a year after the default judgment was entered. Petitioner also never was personally served with Summons (Process). For that reason alone the due process clause of the Fourteenth Amendment was violated.

Secondly, where a party defaults, he has a constitutional right to rely on the demands of the complaint and prayer. The due process clause requires notice appropriate to the matter to be heard. In the absence of a clear manifestation of intentional consent by a client no one is authorized to sacrifice or give up that client's fundamental freedoms, rights, or property.

These principles have application to all men. All men have the right to due process of law. For the foregoing reasons, Petitioner respectfully submits that this Honorable Court should seize the opportunity to fully set forth the basic due process requirements which must be satisfied by the default judgment procedure. What may appear to be an isolated injustice to your Petitioner is in fact a serious erosion of fundamental freedoms. When one man can be unconstitutionally deprived of fundamental rights, who among us is free? Since the default judgment has assumed increasing importance in the administration of justice, it is respectfully submitted that this Honorable Court has an increased responsibility to guarantee that fundamental freedoms not be rendered assunder by the unconstitutional administration of such procedure.

II

An attorney cannot create the attorney-client relationship by his own "assumption" or "belief" that it exists, without a clear manifestation from the purported client. Even if,

arguendo, a party has engaged an attorney, the attorney cannot under a general authorization, surrender or destroy his client's fundamental or basic rights without explicit authority from, and a clear manifestation of, intentional consent by the client. Petitioner never intentionally authorized attorney McCann to file an appearance on petitioner's individual behalf or to consent to the entry of a default judgment against Petitioner, individually, in the Kentucky action.

The findings of the courts below (Kentucky Trial Court, California Trial Court and California Court of Appeals) that the Kentucky Court had personal jurisdiction over defendant individually, violate the due process clause of the Fourteenth Amendment.

Two issues are presented for consideration. First, by what means is the relationship of agency created, between a purported client (principal) and the agent (attorney)?

Second, assuming, arguendo, that the agency relationship has been created, can the attorney bind his absent and purported or "assumed" client in the giving up, surrendering, or losing of substantial, fundamental rights of the principal, the purported or "assumed" client, without his client's consent.

A

WAS THE ATTORNEY-CLIENT AGENCY RELATIONSHIP EVER CREATED?

The opinion of the California Court of Appeals stated that:

> "The creation of an agency does not depend upon the express appointment and acceptance thereof, but may be implied from the words and conduct of the parties and the circumstances of the particular case." (Petition for Certiorari, Appendix B, page 14.)

Petitioner has no quarrel with that general proposition or statement of law. But the rule thus stated should not be applied so as to overrule the well-established principle of agency law that an agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his behalf.

The cases cited in the Opinion of the California Court of Appeals (Petition for Certiorari, Appendix B, page 14), in support of the foregoing quoted proposition, all contain, factually, the element of the principal's clear manifestation of intentional consent to the creation of the agency. That particular element is plainly not present in the instant

A

case!

> "A person is not an agent merely from the fact that he believes he had been authorized to act as agent for another, or purports to act as such." Restatement of Agency 2d, §15(a).

In the circumstances in the instant case, at very best, the only assumption in which the Kentucky attorney (McCann) engaged was the assumption that he represented all of the defendants collectively as partners of the partnerships. He never assumed that he represented the defendants either collectively (in their individual non-partnership capacities), or individually.

Attorney McCann's testimony (his deposition) was admitted in evidence at the trial, in the California Superior Court. When asked if he had been employed as attorney to represent petitioner, Mr. McCann replied:

> "I can't say that separately Mr. Rosenthal employed me as his personal attorney, but having represented all of them in their limited partnership, I assumed I was representing all of them at that time. . . . Whether I was technically employed as Mr. Rosenthal's personal attorney, I don't know that there was any conversation about that."

In fact and in truth, petitioner never authorized attorney McCann to represent him individually. The issue was never discussed with McCann. The only reason petitioner ever had any conversation with McCann in connection with the Kentucky action was a result of the fact that petitioner himself had served as attorney for the limited partnerships in California.

Moreover, in its Opinion, the Court of Appeals incorrectly states a material fact.

> "Before Plaintiff filed the Kentucky action, McCann had represented the limited partnerships and all of the partners in other matters." (Emphasis added.) (Petition for Certiorari, Appendix B, page 14.)

Thus by means of legal fictions, unconstitutionally unwarranted assumptions, and as a result of the above referenced material mistake of fact by the California Court of Appeals relating to McCann's prior representation of the limited partnerships not the partners as individuals, personal jurisdiction was asserted over petitioner individually.

B

ASSUMING THE EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP, UNDER WHAT CIRCUMSTANCES MAY AN ATTORNEY SURRENDER HIS CLIENT'S FUNDAMENTAL RIGHTS?

On the second question - related to the scope and nature of the authority that an agent-attorney has, assuming arguendo, that the existence of the agency is once established, there is clear and abundant authority that even in such circumstances, the attorney may not impair, surrender or destroy his client's substantive rights without his client's clear and explicit consent. Price v. McComisk, 22 Cal. App.2d 92 (1937). See, Gagnon v. Nevada Desert Inn, 45 Cal. 2d 448 (1955) to the effect that:

> "The implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights. . . . An attorney ordinarily does not have implied authority to do an act which will effect the surrender or loss of a client's substantial rights."

Significantly, in the instant case, the "assumption" by McCann that he had the right to represent Petitioner individually, when acted upon, would here surrender petitioner's substantial rights. This is obviously true for the

reason that the prayer of the Kentucky complaint specifically did not seek any personal judgment against your petitioner (Petition for Certiorari, Appendix F, pages 30-36, inclusive). Thus, based only upon his own "assumption" McCann, by filing a Motion deemed an appearance, could be construed to have thus adversely affected Petitioner's substantial rights, and surrender them - in particular the right to remain free of any personam jurisdiction and of alternate personal judgment of the Kentucky Court.

Free nations assure that no man may be deprived of life, liberty or property without due process of law. Your Petitioner, respectfully submits that more than an individual injustice is presented by the instant case. Default judgments must satisfy the fundamental requirements of due process of law. This Court should seize this opportunity to remedy not only an injustice to Petitioner but to all who are deprived a fundamental rights by means of unconstitutionally unwarranted presumptions and legal fictions such as those presented by this case.

Wherefore, Petitioner prays that the instant Petition be granted.

Respectfully submitted,

JEROME B. ROSENTHAL

In Propria Persona, Petitioner

APPENDIX A

STATEMENT OF THE CASE

This case involves a fundamental question of due process. Petitioner was a limited partner in two limited partnerships which were engaged in the oil business in Kentucky. At all times mentioned Petitioner was and is a California resident,and Petitioner has never had so called "minimum contacts" with Kentucky on account of the partnership dealings there, or otherwise.

The limited partnerships entered into a contract and security agreement with Respondent's assignor. Both the general partner, and the remaining limited partners, personally guaranteed said contract and security agreement.

Respondent commenced an action in Kentucky, naming as parties defendant the limited partnerships as entities and the general and limited partners individually.

The Kentucky complaint sounded quasi in rem; it is annexed hereto as Appendix F. It prayed for adjudication, under the contract and Security Agreement, that

- "Defendants and each of them are indebted to Plaintiff in the principal sum of . . . ," plus interest (Appendix F, p. 30 at A),

- Plaintiff "is the owner" of the property (Security)(Appendix F, p. 30 at B),

- Defaults existed, and Plaintiff was entitled to remove and sell the property (Security), and apply proceeds against Defendant's indebtedness (Appendix F, pp. 35, 36 at D).

- Defendants and each of them are indebted to Plaintiff for a reasonable "attorney's fee. . . ." (Appendix F, p. 36 at G).

The Kentucky complaint also prayed for:

- "personal judgment in said" (principal and interest) "amounts against each Defendant who is personally served with Summons herein" (emphasis added) (Appendix F, p. 35 at A), and

- "personal judgment in said" (attorney's fee) "amount against all Defendants who are personally served with Summons herein" (emphasis added)(Appendix F, p. 36 at G).

It is an undisputed fact that Petitioner was never personally served with Summons. Obviously, the plain effect of the Prayer is the seeking of personal judgments only against defendants who were personally served with Summons.

Notwithstanding the foregoing limitations the Kentucky court entered its Default Order and Judgment (Appendix D) awarding a "Personal Judgment . . . against Defendants and each of them, jointly and severally." Thus, the Kentucky Court entered a Default Judgment in personam against Petitioner (who was never

personally served with Summons), although the prayer, in two distinct places, sought personal judgment(s) only against Defendants who were "personally served with Summons."

Before issuing its judgment, the Superior Court in and for the County of Los Angeles determined that the Kentucky court had obtained personal jurisdiction over Petitioner, since an attorney who had been hired by the general partner filed a noticed motion which was determined to be a general appearance binding Petitioner according to Kentucky law.

Even supposing that the Kentucky court had personal jurisdiction over Petitioner, the Default Order and Judgment of the Kentucky court entered for failure to file answer cannot properly or validly grant a personal judgment, on default. As above set forth, the prayer expressly does not seek a personal judgment against any defendant who, like Petitioner, was not served with Summons.

Expressed in another way, the defendant is subject only to such a judgment as the complaint demands of him. Any greater or different relief by Default Judgment is unauthorized. The defendant who decides to default is entitled to rely on the specific demands of the Prayer.

This position was presented to the Court of Appeal, highlighted in the Supplement to Appellant's Brief, i.e., December 17, 1971

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there binding Petitioner personally to Kentucky
law.

Even supposing that the Kentucky court
had personal jurisdiction over Petitioner, the
Default Order and Judgment of the Kentucky
court entered for failure to file an answer cannot
properly or validly grant a personal judgment
on demand. As above set forth, the prayer
expressly does not seek a personal judgment
against any Defendant who, like Petitioner,
was not served with Summons.

Furthermore, in another way, the default
judgment is void as the
improperly entered. Any pleader or
attorney called to assist Judgment is un-
authorized. The defendant who decides to
default is entitled to rely on the specific demand
of the prayer.

This petition was presented to the
Court of Appeals, Eighth Appellate District, Cuyahoga
County, Ohio, on December 17, 19

letter to the Court of Appeal (Appendix G) and included in the Petition for Hearing to the California Supreme Court.

The Court of Appeal did not in any way consider or deal with this important and fundamental question of due process, in its decision.

The California courts gave full faith and credit to a judgment rendered beyond the Kentucky court's power to exercise its jurisdiction and thereby denied Petitioner due process of law.